



Control Number: 51812



Item Number: 169

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PUC PROJECT NO. 51617

**OVERSIGHT OF THE ELECTRIC
RELIABILITY COUNCIL OF TEXAS**

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**BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS**

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PUC PROJECT NO. 51812

**ISSUES RELATED TO THE STATE
OF DISASTER FOR THE FEBRUARY
2021 WINTER WEATHER EVENT**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

RWE RENEWABLES AMERICAS LLC'S MOTION FOR REHEARING

COMES NOW, RWE Renewables Americas LLC and its affiliates ("RWE") and submits this Motion for Rehearing of the Public Utility Commission of Texas' (the "Commission" or "PUC") Orders dated February 15 and 16, 2021 (the "Orders") filed in Project Nos. 51617 and 51812,¹ included hereto as Exhibit "A", Exhibit "B", and Exhibit "C".² RWE respectfully requests rehearing and rescission of the Orders, which were enacted in violation of the Commission's rules, the Public Utility Regulatory Act ("PURA"),³ the Texas Administrative Procedure Act ("APA"), and the Governor's Disaster Declaration.⁴

I. INTRODUCTION

In February 2021, the state of Texas experienced an unprecedented winter storm, which challenged each component of the electric industry. During the storm, the Electric Reliability

¹ *Oversight of the Electric Reliability Council of Texas*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 15, 2021); Project No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021); *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Mar. 1, 2021).

² Exhibit "C" includes the Commission's memorandum dated February 17, 2021, moving the orders from Project No. 51617 to Project No. 51812.

³ Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001–66.016 (West 2007 & Supp. 2014).

⁴ Administrative Procedure Act, Tex. Gov't Code Ann. §§ 2001.001-.902 (West 2008 & Supp. 2014).

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Council of Texas (“ERCOT”), facing significant demand and challenges related to supply, required firm load shed to avoid a system-wide failure.⁵ At the same time, the PUC issued the Orders during two emergency open meetings⁶ directing ERCOT to ensure that firm load that was being shed was accounted for in ERCOT’s scarcity pricing signals, which artificially set ERCOT’s system-wide offer cap at \$9,000/MWh, the maximum amount permitted under 16 Tex. Admin. Code (“TAC”) 25.505(g)(6)(B).⁷ The results of these events were catastrophic, both for the citizens of the State and for the participants in the electric industry. Texans faced days of blackouts in temperatures well below freezing, and certain participants in the industry experienced catastrophic financial losses, while others benefitted from significant windfalls. RWE in particular suffered significant losses as a direct result of the Commission’s Orders.

Through its actions, the Commission chose to unilaterally reset ERCOT competitive pricing at the maximum possible price, something they lack authority to do even in the event of an emergency. There is no statutory authority allowing the Commission to engage in such actions, particularly to establish rules that are contrary to the Commission’s own rules and the ERCOT protocols. Further, the Commission decided to alter energy prices, causing dramatic impacts to the entire electric industry, while failing to give any meaningful notice to the impacted market participants. Changes to Commission rules and ERCOT protocols require significant market input, as well as a timeframe before changes are made effective. Market participants such as RWE relied

⁵ ERCOT Market Notice, M-C021521-01 Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices. (Feb. 15, 2021); ERCOT Market Notice, M-C021521-02, Update: Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 16, 2021); ERCOT Market Notice, M-C021521-05, Update: ERCOT Expectations Regarding Exiting EEA3 and Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 19, 2021).

⁶ See PUC Emergency Open Meeting, *available at* http://www.adminmonitor.com/tx/puct/open_meeting/20210215/ (Feb. 15, 2021); PUC Emergency Open Meeting, *available at* http://www.adminmonitor.com/tx/puct/open_meeting/20210216/ (Feb. 16, 2021).

⁷ See *Calendar Year 2021 – Open Meeting Agenda Items Without an Associated Control Number*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception (Feb. 15, 2021).

on the established Commission rules and ERCOT protocols in making decisions. In the Orders, the Commission took action quickly with effectively no notice, depriving market participants from due process notice and hearing before making changes to the market.

The PUC's actions in this circumstance effectively changed the rules during an emergency in violation of its own authority and without providing adequate notice to market participants. This type of procedural and substantive mistake must be corrected to restore the type of stability participants expect from the Texas electric market.

The Commission failed to follow procedural requirements and lacked authority under PURA or the PUC rules to unilaterally modify competitive pricing. The Commission failed to identify valid substantive authority for its Orders and failed to follow the rules associated with contested case hearings, rulemakings, emergency rulemakings, PURA, or actions under the Governor's Disaster Declaration. Accordingly, RWE respectfully asks the Commission to reevaluate and rescind the Orders in the public interest to mitigate the extraordinary harm that has resulted from the prolonged imposition of scarcity pricing during the storm and to respond to the imminent financial crisis that the ERCOT market is facing by removing the administrative price adders that ERCOT implemented between February 15-19, 2021. The Orders and the resulting implementation of artificial scarcity pricing caps did not and could not work to bring additional generation to the market at that time, and such actions must be corrected.

II. BACKGROUND

Prior to the winter storm, Texas Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in the state, pursuant to Texas Gov't Code § 418.014.⁸ Subsequently, on

⁸ Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas, *available at* <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas> (Feb. 12, 2021).

February 15, 2021, in response to ERCOT's declaration of its highest state of emergency, an Emergency Energy Alert Level 3 ("EEA3"), the PUC issued an order directing ERCOT to ensure that firm load being shed in EEA3 was being accounted for in ERCOT's scarcity pricing signals both prospectively and retroactively during the storm.⁹ The Order also directed ERCOT to suspend the use of the low system-wide offer cap ("LCAP") until the Commission's next regularly scheduled open meeting and to use the high system-wide offer cap ("HCAP") of \$9,000/MWh as the system-wide offer cap until that time.¹⁰ On February 16, 2021, the PUC issued a second order directing ERCOT to take these actions, but rescinding their directive to ERCOT related to correcting certain retroactive prices for load shed.¹¹ As a result of the Commission's Orders, ERCOT set Real Time energy prices at the HCAP for approximately four days.

As with many market participants, RWE suffered substantial financial losses as a result of the extraordinary February 2021 winter storm and the protracted administrative imposition of wholesale prices at the HCAP. RWE is a leading international provider of energy with a large Texas renewable commitment. RWE companies own and operate 21 renewable generation projects throughout Texas, a combination of wind and solar, and associated storage projects all within ERCOT with additional projects currently under construction within ERCOT. RWE has made a significant investment in Texas and is committed to a thriving Texas electric system. RWE has paid all invoices from the subject dates, and though it expects to dispute those invoices through the ERCOT alternative dispute resolution process, the timing of such processes far exceed the needs for immediate relief. As each day passes, the ability to upright the market becomes more

⁹ *Calendar Year 2021 – Open Meeting Agenda Items Without an Associated Control Number*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception (Feb. 15, 2021).

¹⁰ *Id.*

¹¹ *Calendar Year 2021 – Open Meeting Agenda Items Without an Associated Control Number*, Project No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021).

and more difficult. As other market participants fail to pay or seek protection in bankruptcy court, the threat of additional losses to RWE and others looms large.

III. THE COMMISSION'S ORDERS FAILED TO FOLLOW APPROPRIATE PROCEDURE AS SET FORTH IN THE PURA, APA, OR THE GOVERNOR'S ORDERS

In 1975, the Texas Legislature enacted PURA and created the PUC to provide statewide regulation of the rates and services of electric and telecommunication companies.¹² The PUC is responsible for administering PURA and adopting and enforcing rules pursuant to the authority granted in PURA. The PUC is also subject to the APA, as it is well established that the APA is generally applicable to “all state agencies” as the process for judicial review of their decisions.¹³ In its Orders, the Commission did not clearly delineate the authority under which it was implementing its changes to energy prices.

Therefore, not only did the Commission act without authority by issuing the Orders, but even if they had authority, the issuance of the Orders was also procedurally invalid and the Orders should consequently be rescinded and vacated. RWE challenges the Orders on several grounds. First, the Orders were invalid under PURA § 39.001. Second, the Orders were a violation the APA, as they failed to follow all required procedures (for either contested cases, rulemakings, or emergency rulemakings). Last, the Orders failed to procedurally conform with the requirements of the Governor’s Disaster Declaration.

A. The Commission’s Orders Fall Outside of the Scope of Authority Granted in PURA and are a Violation of PURA § 39.001.

¹² *State v. PUC*, 110 S.W.3d 580, 583 (Tex. App.—Austin 2003).

¹³ *See Mosley v. Tex. HHS Comm’n*, 593 S.W.3d 250, 259 (Tex. 2019); *see also Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 563 (Tex. App.—Austin 2008) (finding that “[u]nless otherwise provided, the APA’s contested-case and judicial-review procedures apply to agency-governed proceedings.”).

As a general rule, an administrative agency is a creation of the legislature, and thus, “only has the powers expressly conferred and those necessary to accomplish its duties.”¹⁴ To determine whether the PUC acted appropriately within the scope of their authority under PURA, the Commission’s actions must be evaluated within their grant of authority.¹⁵ Chapter 39 of PURA was enacted to “protect the public interest during the transition to and in the establishment of a fully competitive electric power industry.”¹⁶ Accordingly, the statute expressly limits an agency’s ability to regulate pricing, first by codifying the legislative intent behind PURA, stating that “electric services and their prices should be determined by customer choices and the normal forces of competition.”¹⁷ It also states that “regulatory authorities . . . may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized in this title” and that they “shall authorize or order competitive rather than regulatory methods to achieve the goals of this chapter to the greatest extent feasible and shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition.”¹⁸ However, when deciding to set the entire ERCOT wholesale power market at the maximum amount permissible of \$9,000/MWh, the Commission violated these explicit instructions to follow the “normal forces of competition” when establishing pricing. The Commission’s actions were also a violation of the directive not to make rules or issue orders regulating prices.

¹⁴ *State v. Public Util. Comm’n*, 883 S.W.2d 190, 194 (Tex. 1994).

¹⁵ *Id.*; Tex. Gov’t Code § 2001.174.

¹⁶ Tex. Util. Code § 39.001(a).

¹⁷ Tex. Util. Code § 39.001(a).

¹⁸ Tex. Util. Code § 39.001(c), (d).

The Commission cites to PURA § 39.151(d)¹⁹ in its Orders stating that the PUC has “complete authority” over ERCOT. However, the full sentence granting the Commission with that authority reads: “The commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization’s accountability and to ensure that the organization adequately performs the organization’s functions and duties.”²⁰ Therefore, the scope of the Commission’s authority is much more limited: to “oversee and investigate” ERCOT’s finances, budget and operations, not to carte blanche modify rules and ERCOT protocols or unilaterally change ERCOT’s prices. It is well established in Texas precedent that “the PUC is a creature of the legislature and has no inherent authority.”²¹ Accordingly, the PUC’s delineation of authority from PURA does not encompass the ability to arbitrarily modify rules, ERCOT protocols, and change prices. It is improper for the PUC to confer onto itself greater authority than what was prescribed by the Texas Legislature and to act with authority it does not possess.²²

To establish a rule’s facial invalidity, challengers are required to show that the rule: “(1) contravenes specific statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.”²³ As explained above, the Commission’s Orders directly violate the statutory requirements of PURA, are opposed to the statute’s general objectives, and imposed

¹⁹ The Orders also cite to 16 TAC § 25.501. However, while this rule allows the Commission to initiate certain pricing procedures, it does not provide an avenue for the Commission to unilaterally modify pricing without proper notice under PURA, the APA, or the Governor’s Disaster Declaration.

²⁰ Tex. Util. Code § 39.151(d).

²¹ *PUC of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001) (citing *Public Util. Comm’n v. GTE-Southwest*, 901 S.W.2d 401, 406 (Tex. 1995)).

²² *Public Util. Comm’n v. GTE-Southwest*, 901 S.W.2d 401, 406 (Tex. 1995).

²³ *TXU Generation Co., L.P. v. PUC of Tex.*, 165 S.W.3d 821, 827 (Tex. App.—Austin 2005).

significant conditions and burdens on the electric market during a time of crisis. As a result, the Orders are void in contravention of the requirements set forth in PURA.

B. The Commission's Orders Do Not Comply with the Procedural Requirements of the Administrative Procedure Act and Therefore are Invalid.

In issuing these Orders, the Commission failed to comply with the APA.²⁴ The APA's stated purpose is to "provide minimum standards of uniform practice and procedure for state agencies," including the PUC.²⁵ It governs two key types of agency actions: adjudication and rulemaking. Pursuant to Tex. Gov't Code § 2001.003(1), adjudication occurs when "legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." Rulemaking, on the other hand, is required for any "agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency."²⁶ The resulting question is how to classify the Commission's Orders, as they clearly involve both the legal rights of a party and are generally applicable statements that implement, interpret, and prescribe laws. As explained in further detail below, regardless of how the Commission chooses to categorize its Orders under the APA, the Commission's actions did not comply with the necessary procedures for a contested case, rulemaking, or emergency rulemaking as set forth in the APA, and therefore, the Orders are invalid and should be voided. There is no exception under the APA that would enable the Commission's actions here. As the Texas Supreme Court has stated, "[w]hatever an agency's authority . . . , it cannot extend to contravening the APA's express requirements. . . It would be self-defeating for the APA to allow an agency to use the rulemaking process to sidestep its requirements."²⁷

(1) Contested Case

²⁴ Tex. Gov't Code §§ 2001.001–.902.

²⁵ Tex. Gov't Code § 2001.001(1).

²⁶ Tex. Gov't Code § 2001.003(6).

²⁷ *Mosley v. Tex. HHS Comm'n*, 593 S.W.3d 250, 261 (Tex. 2019).

A contested case is defined under the APA as “a proceeding, including a ratemaking a licensing proceeding, which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.”²⁸ If the Commission believes it was authorized to issue its Orders under the contested case procedure set forth in the APA, a motion for rehearing must be filed no later than the 25th day after the date the decision or order that is the subject of the motion is signed.²⁹

In a contested case, each party is entitled to an opportunity “for hearing after reasonable notice of not less than 10 days” and “to respond and to present evidence and argument on each issue involved in the case.”³⁰ Here, the market participants impacted by the Commission’s orders were not given notice of the energy pricing changes and did not have the opportunity to respond or provide comments to the Commission before it was effective.

Not only were the requirements of notice and a hearing not satisfied with these Orders, but the Commission also failed to follow rules for final decisions and orders required by the APA. In particular, a decision or order is required to include “findings and fact and conclusions of law, separately stated.”³¹ Additionally, the findings of fact “may only be based on the evidence and on matters that are officially noticed.”³² In this circumstance, the Commission failed to comply with any of these requirements through its Orders. Therefore, the Commission’s Orders violate the statutory requirements as set forth in the APA and were issued as a result of prohibited procedure.

(2) Rulemaking

²⁸ Tex. Gov’t Code § 2001.003(1).

²⁹ Tex. Gov’t Code § 2001.146(a).

³⁰ Tex. Gov’t Code § 2001.051.

³¹ Tex. Gov’t Code § 2001.141(b).

³² Tex. Gov’t Code § 2001.141(c).

As previously stated, in its Orders, the Commission did not clearly delineate the authority under which it was acting. However, it is well-established in Texas precedent that when agency actions do not fit squarely into the groupings of “contested cases” or “rulemakings,” the courts look to the effect of the agency actions and the definitions provided within the APA to determine how to best categorize them for purposes of appeals and reconsideration.³³ The APA states that the term “rule” refers to:

- (A) a state agency statement of general applicability that:
 - (i) implements, interprets, or prescribes law or policy; or
 - (ii) describes the procedure or practice requirements of a state agency
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding internal management or organization of a state agency and not affecting private rights or procedures.³⁴

There is no question that the Commission’s Orders are statements of “general applicability” because they broadly effected all participants in the ERCOT market. Further, the Orders expressly interpreted existing law and prescribed new policy regarding those laws: “The Commission believes this outcome [referencing the energy price fluctuations] is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.”³⁵ The Commission evaluated existing laws, chose to interpret the correct way they should be applied, and effectively set a mandatory price at the HCAP for four days. Through its Orders, the Commission essentially engaged in unlawful *ad hoc* rulemaking, which has been defined by Texas Courts as any “agency statement that interprets,

³³ See e.g., *Teladoc, Inc v Tex Med. Bd.*, 453 S.W.3d 606, 621 (Tex. App.—Austin 2014) (finding that an agency action through an “informal” written agency pronouncement regarding law or policy was a “rule” under the APA); *El Paso Hosp Dist v. Tex HHS Comm’n*, 247 S.W.3d 709 (Tex. 2008) (finding that an agency statement was a rule because it was an interpretation of its formally promulgated rules that was not found in the text of the existing rules).

³⁴ Tex. Gov’t Code § 2001.003(6).

³⁵ *Calendar Year 2021 – Open Meeting Agenda Items Without an Associated Control Number*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception at 1 (Feb. 15, 2021).

implements, or prescribes agency law or policy.”³⁶ The Orders obviously prescribe agency policy regarding pricing, and the APA bars any rule modifications or reinterpretation without following the procedures of the formal rulemaking process.

Agency actions that fall into the definition of a “rule” are treated as a rulemaking. In circumstances where an agency action was determined to be a rulemaking, the courts then analyzed whether the APA’s procedures for a rulemaking were properly followed.³⁷ Specifically, the APA requires when the Commission initiates a rulemaking on its own motion, it must give notice of the proposed rule at least 30 days before the rule is adopted and the proposed rule must be published in the *Texas Register*.³⁸ Further, before adopting a rule, the Commission must “give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing” and must grant an opportunity for a public hearing if requested by at least 25 persons, a governmental subdivision or agency, or an association with at least 25 members.³⁹ These rulemaking procedures are designed to maximize “public participation in the rulemaking process,” set forth as the stated purpose for the APA.⁴⁰

Here, the Commission’s Orders did not follow any of these notice and hearing requirements, derailing the APA’s intent to allow public participation in rulemakings. In circumstances where rules are improperly adopted, the courts have found the corresponding rules

³⁶ *CenterPoint Energy Entex v R.R. Comm’n*, 213 S.W.3d 364, 369 (Tex. App.—Austin 2006).

³⁷ See e.g., *Teladoc, Inc v Tex Med Bd*, 453 S.W.3d 606 (Tex. App.—Austin 2014); *El Paso Hosp Dist v Tex HHS Comm’n*, 247 S.W.3d 709 (Tex. 2008); *Tex State Bd. of Pharm. v Witcher*, 447 S.W.3d 520 (Tex. App.—Austin 2014); *Combs v. Entm’t Publ’ns, Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009).

³⁸ Tex. Gov’t Code § 2001.023.

³⁹ Tex. Gov’t Code § 2000.029.

⁴⁰ Tex. Gov’t Code §§ 2001.021–.041.

void and remanded the issues back to the agency.⁴¹ Accordingly, the Orders should be voided and the underlying questions remanded to the PUC for further consideration.

(3) *Emergency Rulemaking*

In certain limited circumstances, the APA provides that an agency may enact emergency rulemaking. If the Commission categorizes its Orders as an emergency rulemaking, the Commission failed to comply with required procedures.⁴²

Given the possible implications of a rulemaking that is not vetted through the typical notice and hearing process, the APA sets forth specific requirements for emergency rulemakings. In particular, the APA permits a state agency to adopt an emergency rule without prior notice or hearing if the agency:

- “ (1) finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days’ notice; and
- (2) states in writing the reasons for its finding under Subdivision (1).”⁴³

The APA also requires that the agency set forth this finding in the emergency rule’s preamble and filed with the secretary of state for publication in the *Texas Register*.⁴⁴ Here, the Commission did not comply with any of these requirements, as they did not make the finding that the Orders were required due to “imminent peril to the public health, safety, or welfare,” nor did they publish the Orders in the *Texas Register*.

⁴¹ See e.g., *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606 (Tex. App.—Austin 2014); *El Paso Hosp. Dist. v. Tex. HHS Comm’n*, 247 S.W.3d 709 (Tex. 2008); *Tex. State Bd. of Pharm. v. Witcher*, 447 S.W.3d 520 (Tex. App.—Austin 2014); *Combs v. Entm’t Publ’ns, Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009).

⁴² Tex. Gov’t Code § 2001.035(b).

⁴³ Tex. Gov’t Code § 2001.034(a).

⁴⁴ Tex. Gov’t Code § 2001.034(b), (d).

Section 2001.035(a) of the APA states that a “rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.034.” The phrase substantial compliance is further explained to mean that “the agency’s reasoned justification demonstrates in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective.”⁴⁵ The changes to ERCOT pricing and protocols mandated by the Commission’s Orders do not meet the substantial compliance standard and should be voided on those grounds. Additionally, because the Commission failed to follow the procedural requirements for emergency rulemaking, the Orders are also void on that basis.

C. The Commission’s Orders Did Not Comply with the Procedural Requirements of the Governor’s Disaster Declaration and Acted Outside its Scope.

In its Orders, the Commission also references Texas Governor Greg Abbott’s Disaster Declaration, but that declaration did not provide a valid basis for issuing the Orders. As previously discussed, in light of the winter storm and expected sub-freezing temperatures, Texas Governor Greg Abbott issued a disaster declaration of all counties in the state of Texas.⁴⁶ Under Tex. Gov’t Code § 418.014, the Governor is permitted to issue a state of disaster if “the occurrence or threat of disaster is imminent.” In his Order, the Governor stated, in pertinent part:

“[A]ny regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor.”

First, the Commission merely referenced the Governor’s Disaster Declaration and did not state that it was a basis for their actions. Regardless, even if the Commission believed its actions were authorized under the Governor’s Disaster Declaration, the Commission failed to obtain written

⁴⁵ Tex. Gov’t Code § 2001.035(c).

⁴⁶ Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas, *available at* <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas> (Feb. 12, 2021).

approval from the Governor's office before implementing the Orders. As a result, market participants were given little to no notice of the energy pricing changes. The Governor's Disaster Declaration requires written approval before deviating from ERCOT protocols or any of the rules of a state agency and the Commission's failure to obtain this approval required voiding the improperly adopted Orders.

Additionally, the Governor's Disaster Declaration allows for the "suspension" of certain rules that may hinder necessary action—it does not allow the Commission to modify the rules to set mandatory price adders for a four day period, as the Orders did here. Accordingly, the Commission acted far outside any potential authority in altering energy prices in a time where the emergency situation only allowed them to suspend certain rules.

IV. CONCLUSION

For the reasons set forth above, RWE respectfully requests that the Commission grant this motion for rehearing, rescind and vacate the Orders, and reverse the artificial administrative price adder that was imposed from February 15-19, 2021. RWE further requests all other relief to which it may be entitled.

Respectfully submitted,

/s/ Alison Gardner

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record on this date via the Commission's Interchange in accordance with the Commission's Order in Docket No. 50664 suspending PUC Procedural Rule 22.74.

/s/ Alison Gardner

Alison Gardner

EXHIBIT A

(PUC Order dated February 15, 2021)

PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC
RELIABILITY COUNCIL OF TEXAS

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PUBLIC UTILITY COMMISSION
OF TEXAS



**ORDER DIRECTING ERCOT TO TAKE ACTION
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals.

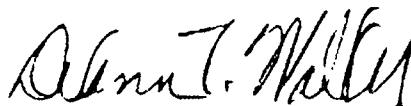
II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 15 day of February 2020.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER

EXHIBIT B

(PUC Order dated February 16, 2021)



PUC PROJECT NO. 51617

**OVERSIGHT OF THE ELECTRIC
RELIABILITY COUNCIL OF TEXAS**

§
§
§

PUBLIC UTILITY COMMISSION

OF TEXAS

**SECOND ORDER DIRECTING ERCOT TO TAKE ACTION
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. However, the Commission determines that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and is hereby rescinded and directs ERCOT to not correct any such past practices.

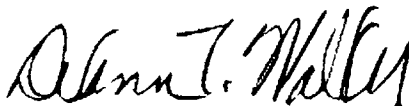
II. Suspension of LCAP in Scarcity Pricing Mechanism Due to Abnormal Fuel Prices

ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 16th day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER

Commissioner Botkin abstains for the portion of this order that rescinds the Commission's directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 and the portion that directs ERCOT to not correct any such past practices. In all other aspects, Commissioner Botkin joins in this Order.



SHELLY BOTKIN, COMMISSIONER

EXHIBIT C

(PUC Memorandum in Project No. 51812 dated February 17, 2021)

DeAnn T. Walker
Chairman

Arthur C. D'Andrea
Commissioner

Shelly Botkin
Commissioner

John Paul Urban
Executive Director



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PUBLIC UTILITY COMMISSION
FILING CLERK

Greg Abbott
Governor

Public Utility Commission of Texas

TO: Central Records

FROM: Stephen Journeay
Commission Counsel

DATE: February 17, 2021

RE: Project 51812, *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Commission orders directing action by ERCOT

Please file a copy of the following orders issued by the Commission attached to this memorandum in the above referenced project.

Order of February 15, 2021 directing ERCOT to take action and granting exceptions to commission rules originally filed in Project 51617 on February 16, 2021.

Order of February 16, 2021 second directing ERCOT to take action and granting exceptions to commission rules originally filed in Project 51617 on February 16, 2021.

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PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC	§	PUBLIC UTILITY COMMISSION
RELIABILITY COUNCIL OF TEXAS	§	
	§	OF TEXAS

**ORDER DIRECTING ERCOT TO TAKE ACTION
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals.

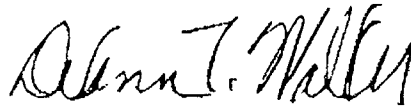
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ERCOT has informed the Commission that generator revenues are approaching the peaker net margin (PNM) threshold established in 16 TAC § 25.505(g)(6). That threshold is currently \$315,000/MW-year. As provided in §25.505(g)(6)(D), once the PNM threshold is achieved, the system-wide offer cap is set at the low system-wide offer cap (LCAP), which is is "the *greater* of" either "(i) \$2,000 per MWh and \$2,000 per MW per hour; or (ii) 50 times the natural gas price index value determined by ERCOT, expressed in dollars per MWh and dollars per MW per hour." Due to exceptionally high natural gas prices at this time, if the LCAP is calculated as "50 times the natural gas price index value," it may exceed the high system-wide offer cap (HCAP) of \$9,000 per MWh and \$9,000 per MW per hour. 16 TAC § 25.505(g)(6).

This outcome would be contrary to the purpose of the rule, which is to protect consumers from substantially high prices in years with substantial generator revenues. It would make little sense to expose consumers to prices that are *higher* than the usual maximum price after a generator revenue threshold has been achieved. Given the need to ensure appropriate energy prices to both consumers and generators during this system emergency, the Commission finds that, in accordance with 16 TAC §§ 22.5(a) and 25.3(b), a public emergency exists and good cause exists for granting an exception to 16 TAC § 25.505(g)(6)(A). On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.

Signed at Austin, Texas the 15th day of February 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER

PUC PROJECT NO. 51617

OVERSIGHT OF THE ELECTRIC § PUBLIC UTILITY COMMISSION
RELIABILITY COUNCIL OF TEXAS §
§ OF TEXAS

**SECOND ORDER DIRECTING ERCOT TO TAKE ACTION
AND GRANTING EXCEPTION TO COMMISSION RULES**

On February 12, 2021, pursuant to Texas Government Code § 418.014, in response to an extreme winter weather event, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.

Further, on February 15, 2021, the Electric Reliability Council of Texas, Inc. (ERCOT) declared its highest state of emergency, an Emergency Energy Alert Level 3 (EEA3), due to exceptionally high electric demand exceeding supply. ERCOT has directed transmission operators in the ERCOT region to curtail more than 10,000 megawatts (MW) of firm load. The ERCOT System is expected to remain in EEA3, and firm load shed is expected to continue, for a sustained period of time in light of the expected duration of the extreme weather event.

This Order addresses two significant market anomalies identified during this EEA3 event.

I. Energy Prices Lower than System-Wide Offer Cap During Load-Shed Event

ERCOT has informed the Commission that energy prices across the system are clearing at less than \$9,000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B). At various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.

Utilities Code § 39.151(d) gives the Commission “complete authority” over ERCOT, the independent organization certified by the Commission pursuant to § 39.151. Further, 16 TAC § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless “otherwise directed by the commission.”

Pursuant to this authority, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market. Accordingly, the Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals. However, the Commission determines that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and is hereby rescinded and directs ERCOT to not correct any such past practices.

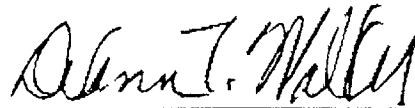
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Signed at Austin, Texas the 16th day of February 2021.


PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER